INTRODUCTION

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In the spring of 1969, the Supreme Court considered a pair of cases that could have changed the course of the death penalty in American history. *Boykin v. Alabama* challenged the death penalty as excessive for robbery.[1] *Maxwell v. Arkansas* questioned the constitutionality of standardless sentencing and single-phase trials.[2] At conference, a surprising, fragile consensus emerged that single-phase trials were problematic.[3]

No one could have predicted what happened next. Earl Warren assigned the cases to the iconoclastic William O. Douglas, who defied his colleagues and circulated an opinion based on both the split-phase trial issue and the standards issue.[4] Two weeks later, Justice Abe Fortas became embroiled in a controversy that forced his resignation.[5] Douglas's majority unraveled. The cases were put over and decided on narrower grounds.

Unpredictability has been the defining feature of the Court's history with the death penalty. When the editors of the *Southwestern Law Review* conceptualized this special issue, the death penalty seemed to be at a crossroads. Speculation abounded that Justice Anthony Kennedy might provide the fifth vote to overturn the death penalty.[6] Merrick Garland was poised to join the Court. As summarized in the article *Why the Death Penalty is Slowly Dying*, American support for capital punishment has been steadily dwindling. Abolitionists had ample reason to be optimistic. As the issue goes to press, things have changed dramatically, to say the least. But woe

1. 395 U.S. 238 (1969).
2. 398 U.S. 262 (1970).
3. *See* EVAN J. MANDERY, A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA 78-84 (2014).
4. *Id.* a0.0050 g04A1>1004F>400440056>30d60.00000 g0 G[(UN)-3(I)5(S)-12(H)15(M)-7(E)8(N)-18(T)8( )]TJETQ0.00u1 6.96 Tf92

unto any student of the history and practice of American capital punishment who claims to know with certainty what will happen next.[7]

What we do know with certainty is that the system of capital punishment has proven an abject failure. In his essay, *Choosing Life: Reflections on the Movement to End Capital Punishment*, civil liberties lawyer Stephen Rohde joins the long tradition, including Stephen Bright[8] and Bryan Stephenson,[9] among many others, of lawyers whose long, deep experience with the practice of capital punishment exposes its systematic flaws. In *Capital Punishment is Constitutional, and a "Cruel and Unusual Punishment." Now. For Now*, Darren Reid offers a new and highly plausible mechanism for ruling the death penalty unconstitutional on the basis of a national consensus of arbitrariness in the administration of capital punishment. I catalog the extensive evidence of this arbitrariness in my essay *Gregg at 40*, showing how reforms to the practice of capital punishment have failed to live up to the requirements of *Furman v. Georgia.*[10]

Now to see what happens next. The world is watching.

7. *See* CAROL & JORDAN STEIKER, COURTING DEATH 289 (2016) ("It's tough to make predictions, especially about the future," quoting Yogi Berra).

8. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

9. BRYAN STEPHENSON, JUST MERCY (2014).

10. 408 U.S. 238, 239-40 (1972).